24TH FEDERAL LITIGATION COURSE

Negotiations and Alternative Dispute Resolution (ADR)*

I. LITIGATION NEGOTIATIONS.

A. Why negotiate?

1. Negotiate to achieve a favorable settlement. Most civil cases settle. Therefore, settlement is not an alternative to litigation, it is a normal outcome of litigation.

2. Settlement saves litigation costs and may avoid other adverse consequences of further litigation, *e.g.*,"bad" press; adverse impact on training and morale; adverse judgment.

3. Settlement is a *flexible* tool. Settlement may afford the parties more creative solutions to resolving their disputes than a judgment after trial would allow. In other words, in negotiating a settlement to litigation, the parties are generally free to craft individualized, nontraditional remedies.

4. Even if negotiations to settle a lawsuit fail, negotiations may be used to help develop the case for trial.

B. Basic Litigation Negotiation Principles.

1. Timing.

a. There are reasons to negotiate at every stage of litigation. (For example, pre-suit you may want to test your facts or educate the other side.)

b. Don't force the other side to prepare its case. Encourage them to invest energy in the settlement process.

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c. The content and timing of depositions and motions affects negotiations.

d. Continue to litigate. Use negotiations to get discovery and to test your theories.

2. Stages and Styles.

a. Most negotiations go through three stages: information exchange, competition, concession.

b. Try to build rapport with the other side so that you can obtain more information, have credibility when arguing, and facilitate concessions.

c. Do not rush the process. Allow for give and take so that both sides get some satisfaction from the process.

d. Be yourself, but be flexible. Vary your style based on your needs and on your opponent's style.

3. Psychology and Motivation.

a. Communicate (directly or indirectly) to the opposing party, not just opposing counsel.

b. Know the "who, how, what, and why" a case settles. Find out as much as you can from the opposition. If you listen, the other side will talk.

c. Get the opposition (both the lawyer and the client) to invest in the settlement effort. Give the other side homework.

d. Maintain your credibility.

e. To improve cooperation, listen carefully and insure that the other side knows that you are paying attention.

4. Offers.

a. Expectations affect the outcome of negotiations. Do your best to influence the opposition's expectations.

b. Recognize the advantage of opening in setting expectations. Start as high or low as you can reasonably justify.

c. Make offers that have two choices. (For example: "If you don't take this offer, then let's begin depositions.")

d. How an offer is conveyed is as important as the offer. Reasons for an offer should be conveyed before the offer, but those reasons should only be enough to explain the offer and frame the dispute.

5. Give and take.

a. Ask the other side to explain/justify its number.

b. Always be prepared to walk away, but never say, "take it or leave it."

c. Leave yourself time and room to negotiate.

II. ALTERNATIVE DISPUTE RESOLUTION.

A. Definition.

"Alternative Dispute Resolution" ("ADR") means any procedure, involving a neutral, that is used in lieu of trial to resolve one or more issues in controversy.

B. DOJ Policy.

"The goal of USAs as participants in ADR and during other settlement discussions shall be as follows: In consultation with the client, to weigh the magnitude and likelihood of all costs, risks, and benefits associated with nonsettlement versus participation in ADR and to consider the best interests of the client and the government, and -- through voluntary settlement and/or ADR, if possible and cost efficient -- to achieve the most favorable result reasonably obtainable under the circumstances on behalf of the client, consistent with applicable law and the highest standards of fairness, justice and equity." Fed. Reg. Vol. 61, No. 136 (July 15, 1996) 36909.

C. ADR Techniques.

1. Arbitration.

a. A flexible adjudicatory dispute resolution process in which one or more arbitrators issue a nonbinding judgment on the merits after an expedited adversarial hearing.

b. Either party may reject the nonbinding ruling and request a trial *de novo*.

2. Early Neutral Evaluation.

The process of bringing all parties and their counsel together early in the pretrial phase of litigation to present summaries of their cases and receive a nonbinding assessment by an experienced, neutral evaluator with subject-matter expertise, usually an attorney, who may also provide case planing guidance and, if requested by the parties, settlement assistance.

3. Judicial Settlement Conference.

A settlement conference before a judge or magistrate judge, who, upon hearing summaries of each party's case and applicable law, may articulate opinions about the merits of the case or otherwise facilitate the trading of settlement offers by mediatory or other techniques.

4. Mediation.

A flexible, nonbinding process in which a neutral third party, the mediator, facilitates negotiations among the parties to help them reach a settlement.

5. Minitrial.

A flexible, nonbinding hearing in which counsel for each party informally presents a shortened form of its case to settlement authorized representatives of the parties in the presence of a presiding judge, magistrate judge, or other neutral, at the conclusion of which the representatives meet to negotiate a settlement.

6. Summary bench trial.

   A pretrial procedure intended to facilitate settlement consisting of the summarized presentation of the case to a judicial officer whose decision and subsequent factual and legal analysis serves as an aid to settlement negotiations.

7. Summary jury trial.

   A flexible nonbinding procedure which involves a short hearing in which evidence is presented by counsel in summary form to a jury. Following the evidentiary presentation, the jury returns an advisory verdict that forms the basis for settlement negotiations.

D. Factors to consider when determining whether and when to use ADR.

1. The parties' purpose in filing the lawsuit demonstrates an agenda separate from the specific issues in the case.
2. Case procedural history, i.e., what administrative proceedings have preceded the filing in court.
3. Assessment of likely outcome including likelihood of appeal.
4. Where is the case in the discovery process? Has all of the information necessary to settle the case been discovered?
5. Where is the United States in terms of procuring settlement authority? Is more information necessary before authority can be obtained?
6. Who is in charge of the litigation, parties or counsel?
7. Are factual disputes significant?
8. Are legal disputes significant?
9. Are parties individuals, corporations or other governmental entities, and how does that affect their ability to participate in the ADR process?
10. Witness credibility and its impact on the litigation.
11. Are there individuals or entities with interests in the outcome who are not parties to the case?
12. There has been prior extensive administrative process.
13. Position on the court docket.
14. Expenses of litigation versus expenses of ADR.

III. CONCLUSION.

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